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No. 97-1578

In the Supreme Court of the United States

OCTOBER TERM, 1997

HOECHST CELANESE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Pursuant to Section 112 of the Clean Air Act, 42 U.S.C. 7412, the Environmental Protection Agency (EPA) promulgated requirements for preventing leaks of benzene from equipment, but exempted equipment at plants "designed to produce or use less than 1,000 megagrams of benzene per year." 40 C.F.R. 61.110(c)(2). Under EPA's interpretation of "use," which includes all benzene employed in a process including recycled benzene, petitioner's Celriver Plant is not entitled to the exemption. The court of appeals held that EPA could seek civil penalties from petitioner for its noncompliance with the regulatory requirements for the period after petitioner received direct notice of EPA's regulatory interpretation, and remanded for a determination of possible penalties. The questions presented are:

1. Whether the court of appeals properly upheld EPA's interpretation of "use."

2. Whether the court of appeals properly held that petitioner was not entitled to a two-year waiver of the requirements after the company received notice of EPA's regulatory interpretation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 128 F.3d 216. The opinion of the district court (Pet. App. 34a-72a) is reported at 964 F. Supp. 967.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1997. A petition for rehearing was denied on December 23, 1997 (Pet. App. 74a-75a). The petition for a writ of certiorari was filed on March 23, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act (Act) authorizes the Environmental Protection Agency (EPA) to identify hazardous air pollutants and their sources, and to prom-

ulgate emission controls for those sources.[1] Prior to 1990, Section 112(b)(1)(B) and (C) of the Act (42 U.S.C. 7412(b)(1)(B) & (C) (1988)) instructed EPA to set National Emission Standards for Hazardous Air Pollutants (NESHAPs) "at the level which in [the Administrator's] judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant," and specified that such standards "shall become effective upon promulgation." Pet. App. 78a.

EPA listed benzene as a hazardous air pollutant in 1977, based on evidence that benzene is a human carcinogen. 42 Fed. Reg. 29,332-29,333. EPA promulgated the final NESHAP for benzene equipment leaks on June 6, 1984. 49 Fed. Reg. 23,479 (Pet. App. 85a). The Benzene Leaks NESHAP applies to specified equipment, such as pumps, valves, and flanges (40 C.F.R. 61.110(a)), and requires regular monitoring and maintenance of leaking equipment, installation of equipment designed to reduce emissions, record keeping and reporting (40 C.F.R. 61.112(a), 61.240-61.247 (Subpt. V)). Violators of the regulations are subject to civil penalties pursuant to Section 113(b) of the Act (42 U.S.C. 7413(b)).

The dispute in this case concerns 40 C.F.R. 61.110(c)(2), which provides that "equipment in benzene service that is located at a plant site designed to produce or use less than 1,000 megagrams of ben-

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[1] Clean Air Amendments of 1970, Pub. L. No. 91-604, §§ 111(b)(1)(A), 112(b)(1), 84 Stat. 1684-1685; Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 112(e), 91 Stat. 703; Health Services Research, Health Statistics, and Health Care Technology Act of 1978, Pub. L. No. 95-623, § 112(e)(5), 92 Stat. 3458 (currently codified at 42 U.S.C. 7411-7412). Section 112 before the 1990 amendments is reproduced at Pet. App. 77a.

zene per year is exempt from the requirements of § 61.112." Pet. App. 124a.[2] Thus, an exempted plant does not have to follow the equipment and monitoring requirements imposed by Section 61.112 and Subpart V, though other requirements, such as reporting, remain applicable. 40 C.F.R. 61.10(a), 61.110(c)(1). EPA explained this exemption in a section of the preamble to the final rule entitled "[i]mpacts on small plants." 49 Fed. Reg. 23,510 (1984); Pet. App. 112a. The exemption reflected EPA's conclusion that the benefits achievable by regulating small volume users such as "research facilities, pilot plants, and intermittent users of benzene" did not justify the costs of compliance. *Id.* at 113a. The preamble referenced a "Background Information Document" which found that a plant with a design production capacity of about 1000 megagrams per year would typically contain around 87 pieces of equipment in benzene service and would be expected to emit only about six megagrams of benzene per year. *Id.* at 8a-9a. Applying the proposed regulations to such a small plant would result in a reduction of only four megagrams per year, which was not considered cost effective. *Id.* at 9a. The rule became effective June 6, 1984. *Id.* at 85a.

2. This case concerns the Celriver plant owned by petitioner Hoechst Celanese Corporation in Rock Hill, South Carolina. During the period at issue, Celriver used benzene to cool hot ketene gases and to help separate water and other compounds from acetic anhydride and acetic acid; after each use, the benzene was cooled, purified and reused in these processes. Pet. App. 4a-5a. Because petitioner never applied for an exemption for Celriver or filed reports as to its

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[2] A megagram equals about 2200 pounds. Pet. App. 4a n.1.

benzene usage, EPA did not become aware until 1989 that this plant was not complying with the benzene leak regulations and was emitting substantial amounts of fugitive benzene. *Id.* at 5a. While Celriver had nearly 17,000 individual sources of benzene leaks and was one of the largest sources of fugitive benzene emissions in the nation at that time (*id.* at 9a), petitioner claimed that it believed the plant was exempt because it "consum[ed]" less than 1,000 megagrams of benzene yearly. *Id.* at 5a.

EPA issued a notice of violation for Celriver on February 20, 1990. In April 1990, petitioner submitted a plan to bring Celriver into compliance with the regulations (Pet. App. 21a), and eventually achieved compliance in August 1992. *Id.* at 26a.

3. The United States brought this action in July 1992, seeking civil penalties against petitioner for the period between 1984 and 1992 when Celriver was not in compliance with the regulations. The parties filed motions for summary judgment on the issue of liability. The district court sustained EPA's interpretation that "use" for purposes of the exemption provision included the total amount of benzene utilized or employed in a process, including recycled benzene. Pet. App. 38a-52a. However, the district court found that EPA did not provide petitioner with fair notice of this interpretation, even after EPA's Region 4, which has jurisdiction over Celriver, informed petitioner by letter dated June 13, 1989, that when benzene is recycled, "'use' for purposes of the exemption must be calculated on the basis 'of total cumulative flow through the process rather than net benzene consumption or usage.'" *Id.* at 20a. Region 4 reiterated this position in August 1989, in a letter that set out an example of how petitioner should calculate the amount of benzene

"use[d]" for purposes of the exemption (*id.* at 21a), and in September 1989 petitioner carried out the requested calculation and determined that its annual use of benzene far exceeded the threshold for the exemption. *Ibid.* The district court nevertheless concluded that petitioner still did not receive fair notice because petitioner allegedly had a "legitimate basis for believing" that the letters from Region 4 did not "speak[] for the Administrator" of EPA. *Id.* at 68a. The district court also concluded that petitioner should not be liable for penalties because EPA did not object to a compliance plan submitted by petitioner in 1990 and because petitioner purportedly would have been entitled to a two-year waiver if it had applied for such a waiver. *Id.* at 69a-70a.

On cross-appeals, the court of appeals first upheld the district court's ruling that EPA's interpretation of the exemption provision was entitled to deference. The court found that EPA's interpretation is in accord with the ordinary meaning of the word "use," and consistent with both the overall purposes of the statute and the stated purpose of the provision to exempt only small plants from the leak detection and repair requirements. Pet App. 7a-10a. The court of appeals upheld the district court's ruling that petitioner did not have fair notice of EPA's interpretation for the period before the 1989 letters to petitioner from Region 4. Critical in this regard was the fact that the Texas Air Control Board, which had been delegated authority to administer the NESHAP program in that State, applied the exemption provision to petitioner's plants in Texas in a manner that could have led petitioner to believe that petitioner's interpretation was accurate. *Id.* at 16a-18a.

The court of appeals reversed the district court's holding that the 1989 letters from Region 4 regarding Celriver did not provide adequate notice of how EPA interpreted the exemption. The majority found that Region 4's letters provided petitioner with direct notice of EPA's interpretation, and cited minutes of a meeting of senior Celriver officials showing that they understood EPA's interpretation. Pet. App. 20a-21a. The majority found that the regulations required compliance within 90 days, unless EPA issued a discretionary waiver, and rejected petitioner's argument that it should presume that a waiver would have been granted if it had been sought. *Id.* at 26a. The court ruled that petitioner's efforts in achieving compliance, while not relevant to liability, could be considered in determining "if, and in what amount, penalties should be imposed for the post-August 1989 violations of [petitioner's] Celriver plant." *Id.* at 25a, 27a.[3] Petitioner's petition for rehearing and suggestion for rehearing en banc was denied on December 23, 1997. *Id.* at 74a-75a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or with any decision of another court of appeals. Accordingly, further review is not warranted.

1. Petitioner first argues (Pet. 9-18) that the court of appeals misapplied this Court's decisions on the proper scope of deference to agency interpretations of

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[3] Judge Niemeyer, dissenting from the judgment insofar as it found that petitioner could be liable for penalties after August 1989, found that Region 4's letters did not "constitute a definitive agency-wide EPA notice such that penalties could be imposed" (Pet. App. 33a).

their own regulations. Alternatively, petitioner suggests (Pet. 22-23) that this Court should "abandon the 'deference' principle and direct the reviewing court to determine the single correct meaning of the [regulation]." Neither claim has merit.

a. Petitioner's first argument is based on a misinterpretation of the decision below. The court of appeals did not defer to EPA's interpretation of the exemption provision "as a matter of course" (Pet. 10), or on the sole basis that the interpretation was "not 'nonsensical'" (Pet. 9, quoting Pet. App. 8a). The court analyzed the language and purpose of the regulatory provision and the statute, and concluded that EPA's interpretation in this case is consistent with both. The court found EPA's interpretation of "use" to be "consistent with the ordinary meaning" of that term, that is "to make use of, to employ" (Pet. App. 7a, quoting *Black's Law Dictionary* 1541 (6th ed. 1990)). The court found that "EPA's interpretation of its own regulatory exemption harmonizes with the purpose of the authorizing statute," which is to achieve "the maximum degree in reduction in emissions of the hazardous air pollutants" subject to the Clean Air Act (Pet. App. 8a, quoting 42 U.S.C. 7412(d)(2)). The court then found that "EPA's interpretation of its exemption accords with the purpose of the exemption itself" which was to exclude only small plants from the leak-prevention requirements (Pet. App. 8a-9a). Petitioner thus errs in arguing (Pet. i, 8, 9-13, 23) that the sole test the court of appeals applied was whether the agency's interpretation was not "nonsensical." The court used that phrase in the course of explaining why EPA's interpretation harmonized with the statute. Pet. App. 8a. But the main thrust of the decision below is that "EPA's inter-

pretation accords with the plain language of the NESHAP, as well as the purposes of the Clean Air Act and of the exemption itself." *Id.* at 10a. Petitioner's warning (Pet. 22) that "the prospect that EPA should be able to read a rule any way EPA pleases so long as that reading is not 'nonsensical' should ring alarm bells in the judiciary," is, accordingly, a false alarm.[4]

Arguing against a straw man, petitioner fails to come to grips with the actual reasoning of the court below. Petitioner instead urges (Pet. 15) that "it is not appropriate for federal courts to defer to agency interpretations that defy the very language of a

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[4] Amici American Automobile Manufacturers Ass'n, et al. similarly misread the majority opinion as concluding that an agency regional office can establish a binding interpretation of a regulation "notwithstanding that other regions have adopted contrary interpretations." Br. 6. In fact, the majority did not accept petitioner's allegations that Region 4's interpretation was contrary to that of other EPA regional offices. It simply noted that petitioner had presented no evidence that it knew of or relied on any "*asserted* contrary interpretation of 'use' by other EPA offices or state agencies." Pet. App. 23a (emphasis added). While petitioner claimed that EPA Region 6 had approved an interpretation contrary to that of Region 4, the evidence consisted, at most, only of acquiescence by Region 6 in the Texas Air Control Board's largely unexplained grant of exemptions to two plants. *Id.* at 56a-57a. That acquiescence hardly amounted to a contrary interpretation. In any event, it was Region 4's interpretation that followed the consistent guidance provided by EPA headquarters that "use" meant "*processing rates* rather than net consumption." *Id.* at 11a-12a (quoting October 5, 1984 EPA letter). Contrary to amici's claim (Br. 10), Region 4's interpretation was "*authoritative*" because it was clearly explained and consistent with the rulemaking itself and with EPA headquarters' interpretations thereof. Pet. App. 7a-12a.

published rule," ignoring the ruling below that EPA's interpretation is in fact consistent with the plain language of the regulation. Pet. App. 7a. Petitioner nowhere explains why the phrase "designed to * * * use" (*id.* at 124a, quoting 40 C.F.R. 61.110(c)(2)) must mean only "designed to consume" and cannot, as the court of appeals found, mean designed to "utiliz[e]" or "employ[]." *Id.* at 11a. Nor does petitioner suggest how limiting "use" to "consumption" can be reconciled with the statute, since that interpretation would allow plants that are designed to re-use benzene to escape regulation, even though (as was the case with the Celriver Plant) they represent some of the largest sources of benzene leaks. See *id.* at 5a. Petitioner similarly fails to deal with the court of appeals' analysis of the preamble to the regulation and the rulemaking record, which showed that the exemption was intended to apply to a "small plant" (*id.* at 8a, quoting 49 Fed. Reg. 23,510 (1984)) which emits about six megagrams of fugitive benzene per year, not a huge plant like Celriver with annual emissions reaching 226 megagrams per year. *Id.* at 9a. As the court's analysis of the preamble and rulemaking record indicates, petitioner's charge (Pet. 14) that "agency staffers change[d] their minds about what they wish[ed] the law to be" is incorrect; the exemption was never intended to limit "use" to "consumption" so as to exempt a facility like Celriver.[5] In

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[5] Similarly, since an interpretation that counts all benzene utilized in a process, including recycled benzene, as "used" is consistent with the language and purpose of the rule, there was no need for a new rulemaking, and (contrary to petitioner's submission at Pet. 17 & n.16) no inconsistency with the directive of Section 301(a) of the Clean Air Act, 42 U.S.C.

sum, the decision below rests not on an unthinking deference to any agency construction that is not nonsensical, but on a careful and considered application of this Court's oft-stated rule that an agency's interpretation of its own regulations should be sustained unless "plainly erroneous or inconsistent" with the regulation. *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); see also *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

b. Petitioner seeks to overturn decades of this Court's rulings on deference by urging that "deference is not appropriate where an agency's post-promulgation interpretation of a *regulation* is concerned," and that courts should determine which is the "single correct" or "best" interpretation of a regulation without deferring to the interpretation of the agency. Pet. 22-23. However, this Court has

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7601(a); Pet. App. 84a, that the Administrator may delegate his powers and duties "except the making of regulations."

Petitioner's complaints of a "secret interpretation" of the regulations (Pet. i), and of interpretations that "were presented, for the first time, in the government's briefs" (Pet. 17 n.15), were also properly rejected by the court of appeals. The court pointed to numerous instances where sources contacted EPA regarding their eligibility for an exemption and were explicitly informed that "the 1,000 megagrams per year cut off limit is applicable to total processing rates, rather than net consumption (usage) or net production." Pet. App. 11a-12a (quoting EPA responses to letters from companies). Thus, the interpretation was hardly "secret." Moreover, petitioner found out only a few months after the regulations had been promulgated that EPA had rejected the use-equals-consumption interpretation in responding to an inquiry from a Texaco facility. *Id.* at 16a. Indeed, petitioner no longer disputes that it received direct notice of this interpretation in the summer of 1989. See Pet. 25-26.

recently reaffirmed the doctrine of deference to agency interpretations of regulations, *Auer* v. *Robbins*, 117 S.Ct. 905, 911 (1997), and has consistently rejected attempts by courts to substitute their own view of the "best" interpretation of agency regulations. *E.g.*, *Arkansas* v. *Oklahoma*, 503 U.S. 91, 112 (1992).

This Court has explained that deference is particularly warranted when a regulation concerns "a complex and highly technical regulatory program," in which applications of the regulation "necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991). That is precisely the situation here, where determining the appropriate scope of an exemption to leak-prevention rules applicable to a great variety of manufacturing operations requires significant technical expertise joined with an appreciation of the statutory policy. See Pet. App. 39a ("A court's review of regulations under Section 112 of the Clean Air Act * * * is particularly limited because of the broad discretion Congress gave EPA to control hazardous air pollutants. * * * This court treads lightly when construing the scope of an exemption that allows a source of hazardous air pollutants to go unregulated."). Petitioner provides no convincing reason for the radical departure it advocates from existing precedent—a departure that would encourage litigation and prolong uncertainty concerning the meaning of regulations.

2. Petitioner does not take issue with the court of appeals' rulings that the company received actual notice of EPA's interpretation of the exemption in the summer of 1989 (Pet. App. 24a), and that the Celriver Plant continued to violate the regulations at least

until August 1992. *Id.* at 26a. Instead, petitioner maintains (Pet. 25-26) that the court of appeals should not have remanded for a determination of possible penalties because the company allegedly was entitled to a waiver of the leak-prevention requirements for two years after receiving EPA's letters in the summer of 1989.

Petitioner does not suggest that the court of appeals' rejection of its waiver theory conflicts with any decision of this Court or any lower court. Moreover, the ruling below (Pet. App. 26a) is plainly correct. Contrary to petitioner's assumption (Pet. 25), a waiver would not have been automatic. Section 112(c)(1)(B)(ii) of the Act (42 U.S.C. 7412(c)(1)(B)(ii) (1988)), provided that "the Administrator *may* grant a waiver permitting such source a period of up to two years after the effective date of a standard to comply," but only "if he finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment." Pet. App. 78a-79a (emphasis added).[6] Petitioner's argument (Pet. 25 n. 21) that EPA "*must* grant a waiver when a source makes a showing that satisfies the statutory test," overlooks the discretionary language of the provision.

In any event, petitioner has made no showing that the requirements for a waiver were met for Celriver.

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[6] EPA's implementing regulations provide that "the Administrator may grant a waiver of compliance with a standard for a period not exceeding 2 years" and set out in detail the requirements for a waiver application, including a description of controls, compliance schedules, and interim emission control steps to be taken during the waiver period. 40 C.F.R. 61.11.

Petitioner suggests (Pet. 25 n. 21) that since its Pampa, Texas, facility was granted a waiver by the Texas Air Control Board in 1985, the Celriver Plant would have qualified for one as well. However, petitioner does not explain why the public health and technological feasibility criteria that govern waivers would apply in exactly the same way at two different plants in different States during different time periods. Had EPA been presented with a waiver application for the South Carolina plant, it would not have been bound by the waiver determination made by the Texas agency.

In sum, petitioner has failed to show any error in the court of appeals' holding that it was not required to assume that petitioner was entitled to a two-year waiver of the benzene leak requirements after it received actual notice of EPA's interpretation of the exemption provision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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